Supreme Court, U. S.
FILED
FEB 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioner,

vs.

JOSEPH P. MOODY, ET AL.,
Respondents.

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,
Petitioner,

vs.

JOSEPH P. MOODY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER ALBEMARLE.

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INTEREST OF THE AMICUS CURIAE.*

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and

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* Consents of all parties to the Chamber's participation have been filed with this Court.

professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before this Court.**

The questions presented in the instant case are matters of continuing importance to the Chamber. The first question is whether the legality of job validated tests must depend upon rigid compliance with the Equal Opportunity Commission's testing guidelines. The second major question is whether the discretion of a trial court to deny back pay may be rendered nugatory by a reviewing court's direction that this award is mechanically to be given as of course.

In this case, the court below held that the Employer's employment testing procedures violated Title VII since these procedures did not precisely comport with the Equal Employment Opportunity Commission's testing guidelines. Thus, the court below, contrary to Congressional purpose as manifested in Title VII (Section 703(h)) and to this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971) viewed the Commission's testing guidelines as mandatory and determined that the

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** *E.g., Connel Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Marco DeFunis, et al.* v. *Charles Odegaard, et al.*, No. 73-235; *Super Tire Engineering Company* v. *McCorkle, et al.*, No. 72-1554; *Corning Glass Works* v. *Brennan*, No. 73-29; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.*, No. 72-1598; *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952; *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

legitimacy of even job related tests depends upon rigid compliance with these guidelines.

The court below also held that a back pay award must be a virtually automatic remedy once a discriminatory employment practice is found to have occurred. In arriving at this conclusion, the decision below ignored the broad discretion to fashion appropriate relief explicitly conferred upon district courts by Section 706(g) of Title VII, and instead forestalled the meaningful exercise of this discretionary power by finding that back pay must be awarded "unless special circumstances would render such an award unjust."

The questions here are of particular concern to the Chamber and its members since any rules that may emerge will exert a substantial impact upon the testing procedures and economic vitality of these members. The rules articulated by the court below and supported by the Commission would freeze the diverse and complicated factual patterns of Title VII cases into inflexible molds. Thus, all employment tests to be legitimate would have to comport strictly to the manifold requirements of the guidelines and back pay would be awarded as of course once discrimination is found regardless of the employer's good faith, job availability or employee qualifications.

Indeed, the Commission itself has stated that no test can comply with the testing guidelines. If the decision of the court below is adopted, employers would be required to forego employment testing and resort to hiring by quota rather than to attempt futilely to conform to the multitude of complex and perplexing guideline requirements. As a consequence, important tools to predict and to evaluate job success will be abandoned in direct contravention to the purpose of Title VII and to this Court's decision in *Griggs*. The Chamber is, thus, vitally concerned that the questions here be properly resolved.

There are other questions at least implicitly raised by this case whose answer will have significant impact on fair em-

ployment policy. For example, some courts of appeals have endorsed awarding back pay to a class and then permitting the class to allocate this award to all individual class members regardless of individual financial loss. The *amicus* urges that this Court consider whether this type of an award should be granted in light of the compensatory nature of the statute's remedial provisions.

Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

SUMMARY OF THE ARGUMENT.

Both this Court in *Griggs* and Congress have required only that employment tests be related to the jobs for which the candidate is being evaluated. However, neither this Court nor Congress have accorded substantive weight to the manifold perplexing provisions of the Equal Employment Opportunity Commission's testing guidelines or decreed that these guidelines be strictly heeded as a precondition to obtaining an employment test that is legitimate under Title VII. The requirement enunciated by the court below,—that employers must conform their employment testing procedures to the standards articulated in the Commission's guidelines in order to comply with Title VII,—would compel employers to forego testing, contrary to the design of that Act and this Court's *Griggs* decision. Indeed, the Commission has acknowledged that there are no known or available employment tests which *can* satisfy the provisions of the testing guidelines, and that it would require in its opinion years before an examination could be developed that would fulfill the directives of these guidelines. Consequently, following the decision below, all employment testing will violate Title VII. Conversely, if the decision below is reversed, as it should be, courts will adjudicate each case upon the presented evidence and a determination of a test's validity will be based upon a reasonable rather than an inflexible standard.

There are additional and compelling reasons that require this Court to articulate that employment tests need not conform to all of the provisions of the Commission's guidelines in order to comply with Title VII. While employment tests are valuable tools to predict the probability of successful job performance, the intricacies of the testing requirements are impossible for many employers to follow. Consequently, if this Court permits the decision below to stand and thereby allows the guidelines to become the inflexible standard against which all employment tests are measured, employers abandoning tests, will be encouraged to resort to a quota system of hiring. That is, the surest way to escape conflict with the Commission and to avoid exhaustive and futile attempts to match the guidelines' criteria is to hire a requisite percentage or number of minority group members without relying upon any testing procedure.

However, hiring by quota not only fosters reverse discrimination, but also is contrary to the mandates of Title VII and the Constitution's Equal Protection guarantees. It follows that to preserve the purpose of Title VII and the concept of meritocracy embedded in the Civil Rights Act and the Constitution, this Court must enunciate that the Commission's testing guidelines will not be used as the inflexible standard to determine the legitimacy of an employer's testing program. In light of the foregoing principles, it is apparent that the Employer has validated its testing procedure and related it to the jobs in all lines of skilled employment, consistent with the directives of *Griggs* and Title VII, though the testing procedure may not have passed each of the guidelines' manifold and intricate requirements.

Turning to the second major issue presented, it is evident that Congress intended a district court hearing a Title VII case to have broad discretion to determine the remedy once discrimination is found. The decision below in requiring that back pay be mechanically awarded once discrimination is found contravened

this apparent congressional intent. The remedial provisions of Title VII were patterned after those of the National Labor Relations Act. Just as the Labor Board was to have maximum discretion to fashion remedies, so too the trial courts under Title VII were congressionally intended to enjoy such discretion. It is antithetical to this congressional purpose to permit a reviewing tribunal in Title VII to severely restrict the circumstances under which a trial court may opt to deny back pay and to require that back pay be granted automatically whenever unlawful discrimination is shown. The court below determined that back pay is to be awarded to a successful plaintiff as of course by erroneously extending this Court's holding in *Newman* v. *Piggie Park Enterprises* (390 U. S. 400, 1968), concerning the awarding of attorney's fees, to embrace the grant of back pay relief.

Furthermore, this Court should enunciate a principle whereby it proscribes granting back pay for an entire class found to have been victims of discrimination. That is, once discrimination against a class has been found there should be a separate determination on an individual basis as to who is entitled to recovery and the amount of this recovery.

Moreover, this Court should require trial courts to limit the class size to include only those persons reasonably likely to be awarded back pay. This Court should permit a trial judge in his discretion to determine the appropriate award in a second hearing following the hearing on the merits. In this manner the primary purpose of Title VII,—to provide jobs and promotion opportunities,—will be effectuated without delay caused by computing monitary awards. Conversely, if back pay is granted as of course employer-defendants would be entitled to a trial by jury which would delay the expeditious resolution of Title VII proceedings. At present, most authorities have justified denying a jury trial to Title VII defendants by relying on the fact that back pay is an integral part of an equitable remedy with the decision whether to award this relief committed to the discretion of the

trial judge. Deprivation of jury trial can be justified—if at all—only so long as the discretion of the trial court is untrammelled by restrictions such as those imposed by the court below.

ARGUMENT.

A. The Legality of Job Validated Tests Must Not Depend Upon Rigid Compliance with the Commission's Testing Guidelines.

1. This Court in Griggs, Consonant with Congressional Intent, Endorsed the Utilization of Job Related Tests and Did Not Condition Their Legality Upon Adherence to the Commission's Guidelines.

In *Griggs* this Court held that when an employment test is related to the jobs for which the candidate is being evaluated, its use is legitimate even though this utilization may disqualify members of minority groups.[1] This holding is in accord with the intent of Section 703(h) of Title VII as revealed by relevant Congressional commentaries. Thus, legislative debates on this section of Title VII were spawned by a decision by the Illinois Fair Employment Commission in *Myart* v. *Motorola Co.* which implied that employers were forbidden to use any tests—including those that were job related or justified by business need—on which whites performed superior to blacks. In reacting against this decision, Congress disavowed *Myart's* implications and determined to insure that employers would be permitted to use job related tests even when these examinations resulted in an adverse impact upon a minority group.[2] Accordingly, an amendment offered by Senator Tower was adopted as in harmony with the

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1. *Griggs* v. *Duke Power Co., supra, at* 434, 436. "Tests" include all employee selection procedures.

2. 110 Cong. Rec. 6415-16; 7213 (Comments Senators Clark and Case); 13492-503 (Comments Senator Tower); 13504 (Comments Senator Humphrey).

purpose of Title VII and was included as part of Section 703(h).[3]

While this Court and Congress have required job related tests, there is no suggestion in either the *Griggs* decision or in the legislative chronicles encompassing Section 703(h) that the intricacies of the testing guidelines must be satisfied before an employment examination may be declared valid under Title VII. In *Griggs* this Court considered the question of whether Title VII proscribed the utilization of a general intelligence test as a condition of employment or promotion when this test was *not* shown to be related to successful job performance. (at 424.) In resolving this issue, this Court held that, "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (at 436.) In reaching this decision in *Griggs* this Court endorsed the Commission's construction of Section 703(h) only to the extent that job related examinations are mandated by the Act: ". . . the EEOC's construction of Section 703(h) to require that employment tests be job-related comports with Congressional intent." (at 436.)

Thus, this Court did not, by deciding *Griggs,* unqualifiedly endorse each of the complex requirements of the Commission's testing guidelines. Indeed, this Court did not undertake the task of analyzing the intricacies of these guidelines, in order to determine if each provision was consonant with Congressional purpose; such an analysis is an apparent prerequisite to endorsing the guidelines *in toto.*[4]

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3. In pertinent part Section 703(h) states:

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin . . ." 78 Stat. 255, 42 U. S. C. § 2000e-2.

4. While this Court stated that the guidelines expressed Congressional will, the context of this statement, together with the failure to

Furthermore, it is apparent that Congress did not condition the validity of employment tests upon strict compliance with the provisions of the guidelines. Congress has not reviewed the promulgation of these regulations and there is no indication that the many aspects and complexities of test validation were ever considered by congressmen responsible for Title VII.[5] In addition, Congress permitted the Commission to issue only *procedural regulations* and thus did *not* empower that agency to promulgate rules having the binding force of substantive law.[6] Accordingly, it is transparent that Congress did not desire to accord substantive weight to the Commission's guidelines or to require rigid adherence to their provisions.[7]

In sum, neither this Court nor Congress has accorded substantive weight to the manifold perplexing provisions of the Commission's guidelines or decreed that they be strictly heeded as a precondition to obtaining an employment test legitimate under Title VII.

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examine the guidelines' provisions, indicates that this Court was referring only to the Commission's construction of Section 703(h) to require job-related tests. (*Griggs*, pgs. 433-436.) Inasmuch as the testing guidelines are now under revision, this Court should give no deference or credence to them at this time. Rather this Court should remand this case to the Trial Court to consider testimony on whether the present guidelines are psychologically supportable.

5. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1126 (1971) hereinafter referred to as *Developments—Title VII*.

6. Title 42 U. S. C. § 2000e-12(a) (1964).

7. It is evident that the Commission itself did not view its testing guidelines as equivalent to binding substantive law when these rules were issued. Thus, when these regulations were formulated, neither public notice was given nor public hearing held as required by the Administrative Procedure Act when substantive matter is involved. Title 5 U. S. C. Section 553(b)(3)(A) (1967). Blumrosen, *Strangers in Paradise; Griggs* v. *Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 61, 97 (1972).

2. If the Legitimacy of Employment Tests Depends Upon Conformation with the Content of the Guidelines, Employers Will Be Forced to Abandon Valuable Job Related Tests.

A requirement that employers must conform their employment testing procedures to the standards enunciated in the Commission's guidelines in order to comply with Title VII would compel employers to forego testing, contrary to the design of Title VII and this Court's *Griggs* decision which expressly endorse the use of testing procedures. Thus, the decision below which enunciates this requirement must be reversed.[8] The Court of Appeals for the Fifth Circuit has, like the court below, exceeded the directives of *Griggs* and Congress by determining that the Commission's guidelines are a mandatory standard that employment tests must meet to be lawful under Title VII. In *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 256 (1974), that court stated, ". . . we note that the company has at no time attempted to validate its tests under the EEOC guidelines, 29 C. F. R. 1607, which we found *mandatory* in *Georgia Power.*" (emphasis added)[9] In addition, in *Rogers* v. *International Paper Co.*, ... F. 2d ....., 9 E. P. D. Par: 9865 (1975) the Court of Appeals for the Eighth Circuit held that the testing guidelines "control" when an employment test's validity is under examination. Moreover, the Commission itself, despite the absence of this Court's mandate or legislative authorization has indicated that mechanical compliance with each provision of its guidelines is a prerequisite to securing an

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8. The court below, unlike this Court in *Griggs* or Congress, has decreed that in order to comply with Title VII, an employer must demonstrate that his test has been validated in strict accordance with the Commission's guidelines. 474 F. 2d at 139.

9. The *Pettway* court referred to its decision in *Georgia Power* concerning the guidelines which held:

> Their guidance should be followed absent a showing that some cogent reason exists for noncompliance." *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 913 (1973).

administrative determination that an employment test is lawful under Title VII. (EEOC Decision, Paragraph 6329, CCH, 1973.)

The decision below, like those of the Fifth and Eighth Circuits and Commission referred to above, promotes insurmountable problems for employers as they attempt to comply with Title VII. Thus, the Government has acknowledged that there are no known or available employment tests which *can* satisfy the provisions of the Commission's guidelines, and that it would require at least two years before an examination could be developed that would fulfill the directives of these guidelines.[10] Consequently, unless this Court reverses the decision below, *all* employment testing will violate Title VII. That is, if employers are required to conform their employment tests to the Commission's standards as manifested by the guidelines, and if no test can meet these standards, then all employment testing will be unlawful. It follows that enforcement of the decision below could completely foreclose testing since employers will abandon this procedure rather than engage in costly and futile contests with the Commission. On the other hand, if the decision below is reversed, courts will adjudicate each case upon the presented evidence and the determination of a test's validity will be based upon a reasonable rather than an inflexible standard.[11]

There are additional and compelling reasons that require this Court explicitly to articulate that employment tests need not conform to all the provisions of the Commission's guidelines in order to comply with Title VII. While employment tests are valuable tools to predict the probability of successful job performance, the intricacies of the testing requirements are "impos-

10. *United States* v. *Georgia Power Co.*, 3 EPD Par. 8318, at pp. 7086, 7092 n. 8 (N. D. Ga. 1971).

11. See, *Civil Rights Law—Fair Employment Testing and Title VII of the Civil Rights Act of 1964*, 20 Kansas L. Rev. 334, 342-43 (1972).

sible for many employers to follow."[12] The complexities of these requirements present oppressive and opaque directives to employers who, rather than chancing a misstep, will likely abandon all objective and job related testing programs.

In the first place, even when an employer is able to demonstrate that his chosen test predicts satisfactory job performance for both blacks and whites, the guidelines place an additional and insurmountable burden upon him if this test leaves blacks underrepresented.[13] In this situation, the employer must additionally *prove* that no alternative hiring, promotion or transfer procedure is available to him that will enable a greater number of blacks to be hired or promoted. (Section 1607.3.) This requirement is impossible to meet. How can an employer *prove* that something does *not* exist? For example, if utilization of a clearly job related test leaves an employer with less of a percentage of blacks than are available in the hiring region, how can he *establish* that alternative methods, such as interviews, would not increase black representation and would not provide equally satisfactory employees.[14]

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12. *Developments—Title VII, supra,* at 1131.

Testing to predict job success, while still a developing science has become increasingly important due to jobs being more complex and bargaining agreements virtually insulating even incompetent employees from discharge. *Employment Testing: The Aftermath of Griggs* v. *Duke Power Company,* 1972 Colum. L. Rev. 900. Professionally developed tests, despite imperfections, are far superior tools to predict job success than are unstructured employment interviews. These tests are "standardized" (the conditions are identical for each applicant), "efficient" (job related information can be quickly collected) and "amenable to objective analysis" (results are subject to statistical evaluation). Moreover, these tests are designed to measure job success regardless of the applicant's race, religion, sex or national origin. Brief of American Society for Personal Administration.

13. Since blacks are prominent in Civil Rights litigation, this brief will refer to them; however, the arguments advanced have equal validity if protected minorities other than blacks are involved.

14. *Developments—Title VII, supra,* at 1130.

Despite the impossibility of following the alternative showing directive, the Commission has required strict adherence. Thus, in EEOC Decision, Paragraph 6329, CCH, 1973, the Commission acknowl-

Second, the guidelines, unlike Title VII or *Griggs*, impose the requirement of differential validity upon employers. (Section 1607.5(b)(5).) Differential validity represents a *Commission presumption* that a test may be valid for one *race*, but not another, or that blacks, while scoring lower on a test will nonetheless perform equally as well as whites on a given job. However, there is very little evidence that supports the Commission's presumption.[15] Nevertheless, if the guidelines are held to be an inflexible standard that employment tests must meet to comport with Title VII, employers will be compelled to maintain test data by racial groups and endure the attendant problems therewith involved. That is, adequate differential studies require large samples of black or other minority employees to be hired at a similar time as whites and work with whites on similar jobs. Very few employers can fulfill this necessary requirement for effective differential studies. Furthermore, the cost of conducting such studies would be nearly prohibitive and particularly onerous when there is substantial evidence that the notion of differential validity has no merit whatever. Moreover, if a test is shown to be differentially valid, it is likely due to the factor of cultural deprivation affecting both whites and blacks rather

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edged that a test was job related, but nonetheless found its use violated Title VII since the employer did not prove that alternative procedures with less adverse impact upon blacks were unavailable. Moreover, the court below, in an earlier decision, *Robinson* v. *Lorillard*, 444 F. 2d 791 (CA 4, 1971) imposed an identical burden upon an employer.

In addition to being impossible to follow, the alternative showing requirement represents an extension of this Court's *Griggs* decision and the mandate of Congress which necessitate only that a test be job related. Similarly, unlike *Griggs*, the guidelines oblige an employer to demonstrate that his testing procedure has "utility." (Section 1607.3.)

15. According to Boehm, *Negro-White Differences in Validity of Employment and Training Selection Procedures: Summary of Research Evidence*, Journal of Applied Psychology, Vol. 56 No. 1 pgs. 33-39 (1972) "there is very little evidence of differential validity . . ." Barrett, *Grey Areas in Black and White Testing*, 46 Harv. Bus. Rev. 92, 94 (1968) agrees with Boehm.

than race. Therefore, compelling data to be collected by racial groups and lowering the passing score for blacks will exert an adverse impact on many whites who, while as culturally deprived as blacks, are judged by scores and standards applicable to more advantaged white employees. Finally, it is inescapable that racial prejudices will be exacerbated if blacks with lower scores are selected for hire or promotion over whites with higher scores.[16]

Accordingly, the requirement that tests must be differentially validated, like that of alternative procedures, exceeds the purpose of Congress and the rule of *Griggs,* and is virtually impossible to meet; if tests must conform to these directives, employers will abandon testing rather than continue examinations and in effect solicit findings of unlawful discrimination.

The Commission's guidelines forestall an employer who desires to use meaningful tests in still another way. In effect they interdict testing for other than entry level jobs unless promotion is "nearly automatic" even though employers generally desire to hire promotable employees and would test accordingly.[17] Hiring promotable employees permits the employer to select from a maximum number of candidates those to promote. Thus, to prohibit tests which enable him to determine promotability and to instead require him to hire the minimally qualified frustrates a legitimate business objective, works against the more qualified employees of all races and thereby undermines this Court's rationale in *Griggs.* (pgs. 434-436.)

The guidelines dictate still another requirement that will cause an employer to forego testing if strictly enforced by the courts.

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16. *Developments—Title VII, supra,* at 1129.

17. Indeed, the Petitioner hires employees into a "pool". From this pool, the employee may move to any one of a number of lines of progression. Since it is not known at the time of hire in which line the employee will be placed, it is both logical and beneficial to employer and employee that a newly hired worker be able to move from the pool to any line. Accordingly, contrary to the reasoning of the court below, the Petitioner should not be proscribed from using a test that predicts job performance on any line.

Section 1607.11 proscribes the imposition of new job related tests upon minority groups whose members, but for earlier discrimination, would have been granted the opportunity to be hired or promoted under less stringent standards previously in force. Consequently, if compelled to comply with this directive, an employer will be obliged to use double standards: members of some minority groups will be measured against lenient criteria while all other employees and applicants will be graded on the standards of the new more stringent job related test. This double standard will have an immediate effect: employer-employee relations will deteriorate and racial tensions will be augmented. Moreover, while the present beneficiaries of this required testing procedure likely will not be those persons actually discriminated against in the past, the double standard's victims will be white workers required to pass the more stringent test to secure employment or promotion. It follows that employers will likely abandon all testing rather than attempt to cope with the problems caused by the double standard requirement.[18]

The upshot is that the decision below occasions manifold problems for employers who desire to utilize tests to secure and promote their ablest applicants. The Commission's guidelines endorsed *in toto* as mandatory by the court below appear designed to frighten employers away from using job related hiring or promotion standards that exert an adverse impact upon members of minority groups.[19] While this may be the Commission's intent, it is contrary to the expressions of Title VII (Section 703(h)) and to this Court's decision in *Griggs*. It follows that the decision below must be reversed and courts instructed to determine a test's legitimacy by relying upon a standard of reasonableness rather than upon the absolute criteria of the guidelines.

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18. This requirement also offends the rationale of *Griggs* which expressly allowed employers to set standards of job related tests as high as they deemed necessary.

19. *Developments—Title VII, supra,* at 1127-1131.

Conversely, if this Court permits the decision below to stand and thereby permits the guidelines to become the inflexible standard against which all employment testing is measured, employers abandoning tests will be encouraged to resort to a quota system of hiring. That is, the surest way to escape trouble with the Commission and to avoid exhaustive and futile attempts to match the guidelines' criteria is to hire a requisite percentage or number of minority group members without relying upon any testing procedure. While this method may discriminate against the qualified by eliminating any shadow of hiring on the basis of merit, the guidelines will not be triggered and the weight of the Commission and the courts will not fall upon the employer.[20] However, as will be demonstrated next, quota hiring is attended by its own legion of problems.

3. Employers, Forced to Forego Testing Rather Than Futilely Attempting to Meet Inflexible Guideline Standards, Will Resort to Quota Hiring to Avoid Conflicts with the Commission.

The impossibility of complying with the guidelines and the Commission's mandate that results be achieved will compel quota hiring.

a) *Hiring by Quota Is Contrary to the Mandate of Title VII.*

Title VII, as originally enacted, reflected the mainstream of social thought on remedying discriminatory practices.[21] However, Title VII was never intended to favor quotas or goals preferring minorities at the expense of other groups on the employment scene. Thus, Senator Kuchel commenting on the proposed bill in 1964 observed that a court "cannot order *preferential hiring* or promotional consideration for any particular race, religion, or other group." (110 Cong. Rec. 6563-64 (1964).) (Emphasis added.) Senator Humphrey agreed with

20. Of course, the employer is deprived of better qualified employees. If the decision below is enforced with respect to testing, accepting this deprivation appears to be his only viable alternative to engaging in a costly and losing bout with the Commission over test validation.

21. Cooper and Sobol, *Seniority and Testing Under the Fair Employment Laws,* 82 Harv. L. Rev. 1598, 1607-1611 (1969).

these observations and, commenting on Section 703(j), emphasized that Title VII does not authorize or permit the imposition of preferential minority employment goals as a means of remedying past discriminatory employment practices:

> "Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group." (110 Cong. Rec. 12723 (1964).)

Again, Humphrey stated:

> ". . . *There is nothing in* [*Title VII*] that will give any power to the Commission or to any court *to require hiring, firing, or promotion* of employees, in order *to meet a racial 'quota'* or to achieve a certain racial balance." (110 Cong. Rec. 6549 (1964).) (Emphasis added.)

An identical view is acknowledged by Senators Clark and Case:

> "[An employer] would not be obliged—or indeed, *permitted*—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." (110 Cong. Rec. 7217 (1964).) (Emphasis added.)

The original determination of Title VII unequivocally to preclude minority preference quotas was reaffirmed by congressional commentaries surrounding the 1972 amendments to Title VII. Thus, Senator Javits (who sponsored many bills which culminated in the 1972 amendments) explicitly stated that Title VII was an "anti-discrimination" measure and was not intended to produce "affirmative action". (118 Cong. Rec. S. 161 (Daily Edition, January 20, 1972).) Senator Javits thereby acknowledged that color-blindness was a cornerstone of Title VII and that the Act mandated that race, religion, sex and national origin be irrelevant to securing or retaining employment. Javits' remarks, just as those reflected in the 1964 commentaries, demonstrate that Title VII is underpinned by the concept of meritocracy whereby immutable personal character-

istics such as race are not relevant to an individual's employment qualifications.

It is patent that the concept of meritocracy is fostered by job related employment testing. As demonstrated, this testing can continue only if the Commission's guidelines do not become an inflexible standard to measure an examination's legitimacy.[22]

Indeed, this Court has recognized that minority preference quotas are inconsistent with the directives of Title VII and the nation's equal opportunity policy. Thus, in *Griggs* this Court stated:

> "[*T*]*he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (401 U. S. at 430-31.) (Emphasis added.)[23]

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22. Title VII is successful primarily because, as originally intended, it reflects strong and just economic and social needs. The use of quotas or goals *preferring* an individual because of race is as detrimental to these needs as is denying employment because of racial characteristics.

In addition, hiring by quota without regard to merit resurrects the criterion of color as a basis for obtaining employment and thereby contravenes the "color-blind" intent of Title VII.

23. Other courts have followed this Court's guidance: in *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (CA 5, 1971), *cert. denied*, 406 U. S. 906 (1972), the Court rejected the proposition that Congress condoned discrimination against nonminority groups that would result from the imposition of minority preference goals. In the closely related area of plant seniority, the Court of Appeals for the Seventh Circuit has clearly stated the intent and purpose of Title VII with respect to minority preference goals:

> "Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the 'last hired, first fired' principle does not itself perpetuate past discrimination. To hold otherwise would be tantamount to

Consistent with the design of Title VII, as reflected in the legislative history and judicial decisions, white employees are entitled to statutory protection identical to that granted to blacks.[24] However, hiring by quota to achieve an acceptable proportion of minority group members declares that this protection is illusory and, moreover, renders the purpose of Title VII nugatory since such quotas realistically can only resurrect racial antagonism.[25] As shown, the impossible requirements of the Commission's testing guidelines endorsed by the decision below appear intended to force employers to abandon all objective testing and resort to hiring and promoting by minority preference quotas to avoid trouble with the Commission. Accordingly, to reassert the purpose of Title VII, this Court must firmly declare that the validity of job related tests does not depend upon rigid compliance with these guidelines.

b) *Minority Preference Quotas Contravene the Constitution's Equal Protection Guarantees.*

The constitutional prohibitions of the Fifth and Fourteenth Amendments are directed against all manifestations of racial or national origin discrimination regardless of the purpose of such discrimination. Consonant with its unequivocal proscription against all forms of discrimination, the Constitution must be forever color-blind. This mandate of the Equal Protection Clause eloquently demonstrates an awareness that society's prejudice and intolerance will be terminated only by the aboli-

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shackling white employees with a burden of past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences." *Waters* v. *Wisconsin Steel Works,* ..... F. 2d ..... (CA 7 August 26, 1974).

To the same effect is *Franks* v. *Bowman Transportation Co.,* 495 F. 2d 398 (CA 5, 1974).

24. See quotation from *Griggs* v. *Duke Power Co.,* above at page 18 (401 U. S. at 430-1).

25. *Hughes* v. *Superior Court,* 339 U. S. 460, 464 (1950).

tion of distinctions based upon race, sex or national origin.[26] Conversely, racial bigotry will be resurrected and perpetuated by administrative policy or judicial decisions whose effect is to shift the inequities from one person to another solely because of immutable and supposedly irrelevant characteristics.

Leagued against these fundamental precepts stand all administrative or judicial mechanisms that encourage the utilization of quotas or goals that prefer "minorities" for employment opportunities solely because of their race, sex or national origin. Such mechanisms include not only the strict enforcement of the Commission's testing guidelines as heretofore demonstrated, but for government contractors, the requirements of affirmative action programs as well. Thus, contrary to the Constitution which commands that neither white nor black applicants can be lawfully denied employment because of race, the effect, and indeed the intent, of the advocates of rigid enforcement of the testing guidelines and affirmative action programs is to deprive qualified whites of employment in order to give priority treatment to blacks simply because of their racial characteristics.[27]

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26. Senator Charles Sumner of Massachusetts, the chief architect of the equal protection clause, defined his concept of equal protection in an argument before the Supreme Court of Massachusetts in *Roberts* v. *Boston*, 59 Mass. (5 Cash.) 198 (1849) in an effort to overturn the state's segregated school law:

> "He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian, or Ethiopian race—he may be of French, German, English, or Irish extraction, but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English or Irish; he is a Man, the equal of all his fellow-men." 2 Works of Charles Sumner, 341-342 (1974).

Though Sumner lost the case, the segregation law was immediately thereafter repealed, and Sumner's concept became the basis of the equal protection clause. Frank and Munro, *The Original Understanding of Equal Protection of the Laws*, 1972 Wash. U. L. Q. 421 (1972).

27. Where limited employment opportunities exist, preference for blacks obviously results in rejection of others. Unlike the educational cases (*Swann* v. *Charlotte Mecklenberg Board of Education*, 402 U. S.

That is, as shown, too stringent enforcement of the requirements of the testing guidelines forestalls all testing and results in the abandonment of the concept of meritocracy, resurrects distinctions based upon color or sex, and thereby deprives qualified nonminority applicants of the equal protection of the law.

It should be evident that minority preference programs, including viewing the testing guidelines as mandatory, are bent upon eliminating the effects of past racial discrimination rather than upon rectifying discrimination directed against certain individuals. However, to utilize racial preferences to the benefit of the favored minority to achieve this goal is to contravene the constitutional guarantee of equal opportunity.[28]

Moreover, in the case of employment opportunities, the encouragement of minority preference quotas to eliminate past discrimination will have the inevitable consequence of creating *present* or reverse discrimination against others equally qualified who are conveniently labeled as "non-minority". Thus, the intrusion of quotas into the employment system results in present and future white applicants, wholly innocent of responsibility for past discrimination, being *denied* employment in favor of blacks due to the scarcity of available positions. It is apparent that past general racial discrimination cannot justify unconstitutional present racial discrimination against white applicants. If such reverse discrimination is condoned or endorsed, a resurgence of the "us" and "them" concepts of the pre-*Brown*

1 (1971)) where whites have no right to insist upon segregated schools, blacks and whites alike may not constitutionally be denied employment opportunities because of race.

28. The Constitution does not guarantee that the effects of racial discrimination will be eliminated. It guarantees only equality of opportunity. *Hernandez* v. *Texas*, 347 U. S. 475, 482 (1954); *Gibson* v. *Mississippi*, 162 U. S. 565, 580 (1896). *Gibson* stressed the right of all persons not to be deprived from serving on a jury due to race; however, *Gibson* specifically rejected the concept of proportional racial representation. In addition, in *Swann* v. *Charlotte Mecklenberg Board of Education, supra*, this Court rejected any right to proportional representation.

era[29] will likely occur to the grave detriment and perhaps the destruction of the many gains now realized by Title VII and related enactments.[30] Thus, if the Government, by endorsing affirmative action programs and by viewing the Commission's testing guidelines as mandatory, succeeds in abolishing objective test scores for hiring, and instead fosters minority preference quotas, which favor blacks, the educative force of the Government's teaching that race is irrelevant in determining worth will be seriously blunted. Where the Government is heard to speak in two voices, one urging color-blindness and the other in opposition stressing that preference is justified solely because a person is a particular color or race, listeners will tend to hear only the voice they desire.[31] Too often our citizens will conclude that race is pre-eminent in securing and retaining job opportunities with individual merit having slight influence. Old antagonisms will flame anew as racial competition is exacerbated and the federal goal of equal opportunity—the only goal protected by the Constitution—may well be an unfortunate casuality.

Furthermore, by discouraging objective testing and encouraging the resort to quota hiring which clearly is intended to favor blacks, the Commission has produced a corresponding detrimental impact upon the many other minority groups that comprise our society.[32] This Court has considered this impact and

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29. *Brown* v. *Board of Education,* 347 U. S. 483 (1954). This case emphasized that all racial discrimination is simply wrong and must be prohibited.

30. Flaherty and Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas,* 12 Duq. L. Rev. 745 (1974).

31. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Interest,* 61 N. W. L. Rev. 363, 380 (1966); Berelson & Steiner, *Human Behavior,* 113 (1964).

32. While the Commission and affirmative action groups apparently desire to favor blacks by abolishing objective test scores for hiring or promotion, other minority groups with the exception of blacks, may well wish to preserve these objective criteria to protect

has determined that preference based upon race cannot be maintained as a constitutionally endorsed principle, is incompatible with out system of government, and would create new antagonisms in our society:

> "If petitioners [blacks] were upheld in their demand [proportional representation in employment] then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.
>
> "These considerations are most pertinent in regard to a population made up of so many diverse groups as ours . . . [T]here could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portugese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities . . . The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostility by leave of law." *Hughes* v. *Superior Court,* 339 U. S. 460, 464 (1950).

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them from preferential treatment *in favor* of blacks. Fiss, *The Fate of an Idea Whose Time Has Come: Anti-discrimination Law in the Second Decade After Brown* v. *Board of Education,* 41 U. of Chi. L. Rev. 742, 752.

> "The history of the racial civil rights movements has been to change the law to prevent the dominant status of one race over another race and to establish an equality of legal status. This has ironically created a new intangible power still controlled by Whites in power, who are haunted by "white guilt" and seek to atone with a self-imposed restitution of the group. Fortunately for those in charge of determining the terms of the restitution, payment is to be made by *other* Whites not in power, or unable to enter the power structure because they have been told to stand aside." Flaherty and Sheard, *supra* at 766.

The authors point out that it is not the white persons who have control of the power structure who are likely to be disadvantaged by preference for blacks, but other racial and ethnic minorities and poor whites who together comprise what sociologists have described as the "underclass". See also Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment, supra.*

Indeed, if benefits are to be distributed according to racial or ethnic groups, it likely will be a short time before all of our citizens will announce an ethnic identity in order to secure priorities.[33] Once preferences have been awarded according to "minority group" it is not likely that this group will voluntarily abandone its preferential position.[34] It is equally unlikely that any political administration will legislate away all granted priorities. Consequently, priorities and quotas based upon a group's racial or ethnic composition will proliferate with the inevitable result that differences in race and culture will become again the foundation for antagonism in our society—all this with the complicity of law.[35]

It has been demonstrated that the Commission's guidelines, if strictly applied—as in the decision below, will result in the abolition of even job related tests, and drive employers to use a quota system of hiring and promotion favoring blacks to avoid trouble with the Commission and lower courts. However, quotas both contravene the purpose of Title VII and are antithetical to the Constitutional guarantees of equal protection. It follows that to preserve the purpose of Title VII and the

33. Once minority preference quotas are approved in the employment field, preference in the political arena may be sought by affirmative action proponents. They may well argue that the one man one vote principle should be no more durable than color-blindness and that the black needs two votes to "catch up". Thus, sanctioning quotas in one area has lasting and far reaching ramifications in others and all such preferences undermine the constitutional precepts of our government.

34. "Once you grant people a special privilege, you can as easily take it back from them as take back meat from a tiger." Glazer and Himmelfarb, *McGovern and the Jews: A Debate,* 54 Commentary 43, 49 (September, 1972).

35. Moreover, if benefits are awarded because of race, regardless of any asserted benevolent purpose, it has been suggested that courts will soon be required to determine the race of individuals who possess mixed racial origins. Bittker. *The Case of the Checker Board Ordinance: An Experiment in Race Relations,* 71 Yale L. J. 1387, 1422 (1962).

concept of meritocracy embedded in the Civil Rights Act and the Constitution, this Court must enunciate that the Commission's testing guidelines will not be used as the inflexible standard to determine the legitimacy of an employer's testing program.

4. The Employer's Testing Procedure Comported with the Requirements of Title VII.

The principles discussed above demonstrate that the Employer's testing procedures comported fully with the requirements of Title VII. A review of the steps taken by the Employer to meet the demands of the Statute is necessary to demonstrate the validity of this contention. Prior to the effective date of Title VII the Employer began actively to recruit black applicants from the geographical employment area in order that they might participate in its apprentice program. The Employer also solicited applications for this purpose from its black employees. Consonant with the mandate of this Court in *Griggs*, the Employer utilized an acknowledged expert to determine if its testing program was job related. The expert in turn followed a manual issued by the Commission on August 1, 1970, and entitled "Guidelines of Employee Selection Procedures". The expert directed that each employee be given three tests designed to predict and reflect the employee's ability to perform his assigned task. The employee's actual job performance was then independently rated by two supervisors who did not know the employee's test scores.

Each employee's test results and job performance ratings were then transmitted to the expert for a statistical correlation. The exerpt determined:

> "Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. . . . The EEOC could not reasonably object to these standards in light [of] the validation data covered in this report."

The district court then found that:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings."

Furthermore, the district court found:

> "The group tested was typical of employees in the skilled lines of progression . . . the personnel tests administered at the plant have undergone validation studies and have been proven to be job related."[36]

It is thus apparent that the Employer validated its testing procedure and related it to jobs in all lines of skilled employment, consistent with the directives of *Griggs* and Title VII, even though the testing procedure may not have passed each of the guidelines' manifold and intricate requirements.[37] At the very

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36. The district court found that the complexity of the Employer's newly installed machinery and the sophistication of the job required employees with "a high level of native intelligence." Consequently, that court found that the Wonderlic "verbal" test which measured reading ability was job related. Inasmuch as the Wonderlic searched for an indispensible job factor, it is demonstrably a reasonable measure of job performance, and cannot be declared discriminatory in this case. See, *Griggs* at 431, 436.

37. The decision below suggested that discrimination resulted from the absence of "job analysis". However, it is evident that the reasonable equivalent of "job analysis" was utilized by the Employer. Thus, when supervisors independently rated an employee's job performance, they were necessarily considering the requirements of the task with which they were unquestionably familiar.

Furthermore, the criticism of the decision below that the Employer's job analysis was subjective and therefore inadequate is unwarranted. The technique of job analysis in industrial psychology is not only undeveloped and inexact, but also is necessarily highly subjective. In the first place, the analysis of the variables that constitute a particular job depends upon the subjective views of the supervisor, researcher, or employee. Second, any hierarchy of tasks constructed after job duties are isolated also reflects subjective views. In addition, it appears from available psychological evidence that a supervisor's overall impression of an employee is a reasonable validating method; it has not been demonstrated that such an evaluation will be more subject to bias than will ratings based upon specific

least, rather than penalizing the Employer by proscribing the continued use of its testing procedure, this Court should remand this issue to the trial court so that the Employer may demonstrate that its procedure is valid consonant with the principles underlying Title VII and *Griggs*.

B. Congress Intended Trial Courts to Have Broad Discretion to Fashion Remedies in Title VII Cases to Fit the Equities of the Particular Case: The Decision Below Contravenes This Intent.

1. The Lower Court Decision that Back Pay Must Mechanically Be Accorded Severely Restricts the Proper Exercise of the Trial Court's Discretion.

Congress intended a district court hearing Title VII case to have broad discretion to determine the remedy once discrimination is found. The language of remedial Section 706(g) and the congressional commentaries endorse this contention. The unambiguous words of that section are ". . . which *may* include reinstatement or hiring of employees, with or *without* back pay. . . ."[38] (emphasis added.)

Further, Section 706(g) was patterned after the remedial provisions of the National Labor Relations Act.[39] Thus, the wording of Section 706(g) is virtually identical with that of Section 10(c) of the NLRA. Then, too, during the Senate

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behavior traits. Accordingly, to reject a job analysis, as did the court below, because it failed to quantify criteria representing work behavior demonstrates a misunderstanding of the current development of industrial psychology and of the concept of "job analysis". See Brief submitted by American Society for Personnel Administration.

38. Section 706(g) of Title VII (42 U. S. C. § 2000e-5(g)) provides in relevant part:

> "The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ."

39. Section 10(c) of the NLRA (29 U. S. C. § 160(c)) provides for "affirmative action including reinstatement of employees with or without back pay."

debate involving Title VII, Senator Humphrey stated that the relief provisions of Title VII were modeled after those contained in the NLRA:

> "The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act." (110 Cong. Rec. 6549, 1964)

It follows, in view of the intended parallel between the remedial portions of the two Acts, that an examination of this Court's decisions concerning the Labor Board's discretion to frame remedies is instructive to determine the breadth of discretion afforded to District Courts in Title VII proceedings. In *Phelps Dodge* v. *N. L. R. B.*, 313 U. S. 177 (1941), decided under 10(c) of the NLRA, the Board had first found an unlawful discharge and had then mechanically ordered reinstatement and full back pay even though the discharged employee had not earned any wages during the period of his termination. This Court remanded the case to the Board for that agency to consider if damages should have been mitigated and stated:

> "Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." (313 U. S. at 198.)[40]

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40. Courts in Title VII cases as well as Board cases have followed the principle of mitigation of damages demonstrating the similarity of remedial precepts under the two Acts. In *Jurinko* v. *Edwin L. Wiegand Co.*, 331 F. Supp. 1184 (W. D. Pa., 1971) modified, 477 F. 2d 1038 (CA 3, 1973) a Title VII case, the court found one of two illegally discharged employees had failed to exercise due diligence to seek interim employment. Accordingly, using the earnings of

This Court reaffirmed the Labor Board's extensive powers to frame remedial orders in *N. L. R. B.* v. *Food Store Employees Union, Local 347,* ..... U. S. ..... (May, 1974), 86 LRRM 2209, when it observed: "Congress has invested the Board, not the courts, with broad discretion to order a violator 'to take such affirmative action' as will effectuate the policies of the Act." at 86 LRRM 2211.

As demonstrated, the remedial provisions of the NLRA were the model for those of Title VII. It is evident that Congress was aware that this Court accorded broad powers to the Labor Board rather than to the reviewing courts to fashion affirmative remedies under the NLRA. Thus, it is reasonable that Congress in Title VII cases chose to invest the trial court, rather than the reviewing court, with extensive discretion to determine the appropriate relief after considering the variables of a particular case.

It is antithetical to this liberal investment to permit a reviewing tribunal in Title VII matters to severely restrict the circumstances under which a district court may opt to deny back pay and to instead require that back pay be granted mechanically whenever unlawful discrimination is shown. Moreover, this Court's construction of another statute, which like Title VII provided equitable relief, supports according to the trial court untrammelled discretion to fashion remedies in Title VII cases. In *Hecht* v. *Bowles,* 321 U. S. 321 (1944), this Court upheld a denial of injunctive relief despite the Emergency Price Control Act of 1942 which directed that this relief "shall be granted . . ." This Court's observations in *Hecht* are equally applicable here:

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the employee who had found work as a guide, the court reduced the monetary award granted to the employee who did not seek work. In *McLaughlin* v. *Mercury Freight Lines, Inc.,* 5 F. E. P. Cases 769 (S. D. Ala., 1972), aff'd. 472 F. 2d 1406 (CA 5, 1973), a Title VII case, the court considered an employee who had resigned his interim work for an unjustified reason and deducted earnings as if he remained employed.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and mold each decree to the necessities of the particular case . . . equity [is] the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims . . . If Congress [had] desired to make such an abrupt departure from traditional equity practice . . . it would have made its desire plain." (at 329-330.)

Since in *Hecht*, this Court held that discretion resided in the trial court regardless of the mandatory language of the statute, it follows that under the *permissive* wording of Section 706(g) unimpeded discretion to mold remedies to the necessities of each case must reside in the trial judge.

It is within this framework that the decision below must be examined. The court below held that a successful plaintiff should ordinarily be entitled to back pay, and that when an injunction is granted, back pay must follow. (474 F. 2d at 140-141.)[41] The court below strongly suggested that an employer's reliance on a state statute allegedly conflicting with the mandate of Title VII would constitute the only special circumstance justifying the denial of an award of back pay. (474 F. 2d at 142, n. 5.) Accordingly, the rule expounded by the decision below virtually nullifies the circumstances under which a trial judge may deny back pay and in contravention with the design of Title VII, renders the trial court's discretionary power nugatory.[42]

It follows that the order below concerning back pay must be reversed so that Congress's intent to grant broad discretionary powers to trial courts may be effectuated.

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41. *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1376, n. 35, has so interpreted the decision below.

42. *Kober* v. *Westinghouse Electric Corporation*, 480 F. 2d 240, 247 (1973).

2. The Decision of the Court Below Was Based Upon a Fallacious Analogy Between an Award of Attorney's Fees and a Grant of Back Pay.

The court below determined that back pay is to be awarded to a successful plaintiff as of course by erroneously extending this Court's holding in *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400, 402-403 (1968), concerning the awarding of attorney's fees, to embrace the grant of monetary relief. (474 F. 2d at 142.) Thus, *Newman* held that attorney's fees should generally be granted to successful plaintiffs who bring an action under Title II against a manager of public accommodations, since the plaintiff in instituting the action is acting as a "private attorney general" and vindicating the public interest. While the same rationale may warrant allowing attorney's fees to successful plaintiffs in Title VII actions,[43] this reason does not support awarding back pay as of course. In endorsing a mechanical award of attorney's fees and thereby approving a significant restriction of the trial court's discretion, this Court recognized that the *initiation* of Civil Rights suits advances the commonweal. This public purpose is satisfied when the suit is brought regardless of the individual factual patterns or equities of a particular case, and attorney's fees represent an acknowledge-

43. The statutory provisions concerning allowing attorney's fees in Title II and Title VII actions are virtually identical:

Title II, 42 U. S. C. § 2000a-3(b):

"(b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

Title VII, 42 U. S. C. § 2000e-5(k):

"(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

ment of the plaintiff's concern for the public's interest.[44] Back pay, however, stands on a different footing. This type of monetary award is designated to afford compensatory relief for private, not public, inequities.[45] Accordingly, the often unique facts of the case under consideration, including the employer's good faith, and an employee's failure to pursue promotional opportunities or his lack of qualifications must be examined to determine if back pay is appropriate. Apparently recognizing that diverse and complicated situations exist in Title VII cases, Congress determined to avoid the rigidities of an either-or rule in the area of back pay.[46]. Therefore, the decision to grant or deny this award was entrusted to the trial court as the tribunal in the best position to properly evaluate all the relevant factors in a particular case. As the Eighth Circuit observed:

> *"We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court."* (emphasis added.)[47]

The teaching of the Eighth circuit is appropriate to problems in this case, as the following illustration demonstrates. In *United States, et al.* v. *United States Steel, et al.* a district judge considered alleged discrimination at a major steel works in Fairfield Alabama.[48] Exercising his discretion, he determined to grant back pay to some classes and to deny it to others. To mold

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44. *Developments—Title VII, supra,* at 1254.

45. Thus, an individual's interim earnings are set off against any award of back pay to him. See note 39, *supra.*

46. Congress granted broad discretion to the District Court to fashion remedies in Title VII cases as the equities of the particular case compel. *Le Blanc* v. *Southern Bell Tel. & Tel. Co.,* 460 F. 2d 1228 (CA 5, 1972), *cert. den.,* 400 U. S. 990 (1972). (District Court did not err in refusing to grant back pay to plaintiffs.)

47. *Larson* v. *United States,* 296 F. 2d 167, 170 (CA 8, 1961); See, *N. L. R. B.* v. *Food Store Employees Union, Local 347, supra.*

48. 371 F. Supp. 1045 (N. D. Ala., 1973). This case involved 12,000 employees, and included 10,000 pages of exhibits.

relief to fit the necessities of the particular cause before him, the judge examined the many variables involved in that consolidated proceeding. Thus, among other factors, the judge considered the employer's available job opportunities for all employees at the Fairfield works. Relevant to this analysis was the ever increasing impact of automation together with the area's economic conditions. In addition, the trial court examined the qualifications of minority employees to fill the available positions. Moreover, the trial judge in framing an equitable remedy balanced the employer's voluntary attempt to comply with the directives of the Civil Rights Act by opening promotion opportunities to every employee regardless of race. Furthermore, he considered the fact that significant numbers of minority group members voluntarily elected to refuse nondiscriminatory opportunities to secure available promotions. These and other factors convinced the trial judge that back pay and other monetary relief should be denied to certain classes of minority employees. On the other hand, had the special circumstances rule decreed by the court below been in effect, the trial court would have had no occasion to analyze or even review the relevance of these variables since it would have been required to award back pay to all classes, regardless of these factors, in tandum with any injunctive relief. It is apparent that Congress intended the variables examined by the trial court to be considered in Title VII cases; the repeated use of the word "may" in Section 706(g) eloquently establishes this intention.

The court below did not find that the District Court abused its discretion. Rather the decision below transmogrified the discretionary powers of a trial court into a mirage by holding that a "district court *must* exercise its discretion as to back pay in the *same manner* as it exercises discretion as to the attorney fees under Title II of the Civil Rights Act." 474 F. 2d at 142. (Emphasis added.) In so holding the decision below has misread Congress's intentions in the area of back pay and therefore must not be countenanced by the Court.

3. The Equitable Philosophy of Title VII's Remedial Provisions Requires that a Balance Be Struck to Accommodate the Interests of All Parties.

This Court has observed that the remedial provisions of Title VII are equitable in concept. See, *Curtis* v. *Loether*, ... U. S. ....., 94 S. Ct. 1005, 1009-10 (1974). In order to foster the equitable nature of these remedial provisions, the amicus suggests that this Court enunciate certain guiding principles for the Commission and lower courts to follow. While Courts of Appeals have authorized awards of back pay for an entire class found to be a victim of employment discrimination and have then permitted this award to be allocated among the class members regardless of individual financial loss, the Chamber contends that these decisions are contrary to the remedial intent of Title VII.[49] As has been established, Title VII's remedial provisions are analogous to those of the National Labor Relations Act. Thus, consistent with the instruction of the Labor Act, a finding of class discrimination is not itself a proper premise for determining that any individual class member is to be awarded compensatory relief. Back pay or related compensation must be limited to those persons suffering actual damage. There should be a separate determination on an individual basis as to who is entitled to recover compensation and the amount of this recovery. To determine if a particular class member merits compensatory relief, complex factors must be evaluated. These variables include job availability, the employee's qualifications for the available job opportunity, and voluntary rejection of promotion chances and of course interim earnings. Individual circumstances will vary and not all members of the class will automatically be entitled to any recovery or the same amount of recovery. Consequently, damage awards must be individualized so that the constitutional problems which would arise in taking property from an employer to give to another without a showing of loss to the recipient

49. *Pettway* v. *American Cast Iron Pipe Co., supra,* at 267.

will be avoided.[50] In short, this Court should specifically articulate that back pay awards for a class are inconsistent with the remedial concept of Title VII, that class discrimination does not necessarily mean that every class member is entitled to back pay, and that back pay awards must be granted only to those persons who have suffered actual monetary loss.

Independently of but consistent with the foregoing, there must be some meaningful control over the class itself.[51] Courts should be instructed to limit class size by including in a class only individuals who have actually applied for *available* job openings, particularly where the employer, during the relevant time period, has been conducting his operations in good faith compliance with the Civil Rights Act and related enactments.[52] The conceivable alternative would be to include every minority member in the geographical hiring area in the affected class merely because they *might* have sought available employment opportunities. However, this inclusion would be totally at odds with determining damages on an individual basis as mandated by the remedial provisions of Title VII and the NLRA from which these provisions were copied. That is, many members of a class embracing an entire hiring area could not begin to assert actual damages. Therefore, unless this Court is prepared to permit monetary relief to be awarded in a lump sum to the class and then allocated to class members regardless of individual harm, it should not permit the class to exceed those who may reasonably expect to be compensated.

Moreover, massive class awards allocated to virtually unlimited class members regardless of individual harm are not only

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50. *Pettway* v. *American Cast Iron Pipe Co., supra,* concurring opinion of Bell, C. J. at page 267.

51. The rationale of this Court in *Eisen* v. *Carlisle & Jacquelin,* 94 S. Ct. 2140 (1974) partly turned upon the need to judicially manage class size so as to avoid a "Frankenstein monster posing as a class action," at 2148.

52. *Thornton* v. *East Texas Motor Freight,* 497 F. 2d 416 (CA 6, 1974).

antithetical to the remedial purpose of Title VII but also will have a devastating impact on the economic well being of employers. If this Court were to sanction such awards being made against employers, particularly those who are attempting to comply with equal opportunity policy, many employers will simply be forced to shut their doors to the detriment of blacks, whites and the commonweal. There are alternatives to huge back pay awards and these should be fully explored by trial courts. For example, where an employer is recruiting and hiring increasing numbers of blacks (without resorting to "reverse discrimination"), instituting programs designed to assist blacks in overcoming educational disadvantages and publicizing its equal opportunity policy, a court could well encourage these efforts by requiring no monetary penalty and retaining jurisdiction for a reasonable period of time to insure continued implementation of these statutory policies.[53]

Furthermore the philosophy underlying Title VII strongly suggests that the heart of this statute is to insure that members of minority groups will obtain and then retain job and promotion opportunities. Upward mobility, rather than back pay is the prime concern of Title VII. Consequently, the amicus suggests that, similar to proceedings before the Labor Board, a trial court should have discretion to order a procedure of two hearings in order to actually facilitate the realization of the

53. See, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (CA 8, 1970).

Under the Act, when an employer is charged with a Title VII violation, his potential liability for back pay extends backward two years prior to the date the charge is filed with the Commission. (Section 706g). If during this two year period, the employer has earnestly attempted to comply with Title VII by instituting programs similar to those begun in *Parham*, a trial court should have discretion to either totally expunge his liability for back pay or to decree that it should not accrue after the date these programs were first implemented. In this way even if the employer had in the past violated Title VII, his good faith efforts to comply with its requirements are encouraged by the elimination or reduction of back pay liability. cf *Local Lodge No. 1424 I. A. M. (Bryan Mfg. Co.)* v. *N. L. R. B.*, 362 U. S. 411; see text to note 28, *supra*.

paramount purpose of Title VII. That is, the first hearing would determine liability; the second, if necessary, would compute the amount of back pay when that remedy is directed. This is similar to Labor Board procedures where a hearing on the merits of the case is held and remedy not considered. Only if monetary liability is established and the parties do not voluntarily settle on the extent of this remedy, is a second "back pay" hearing held.[54]

Very likely the second hearing will be unnecessary. Following a determination of liability, the parties, employer and minority group employees who must live together in order to function as a productive entity, will most probably themselves resolve the issues concerning remedy. Thus, an employer found to have violated Title VII will likely meet with representatives of the affected minority to determine the mechanism of restitution. Inasmuch as the parties must coexist and to preserve public image, an offending employer will wisely and promptly restructure his operations so that minority group members will have an equal opportunity for jobs and upward mobility. Monetary relief also will be trailored by the parties to not only fit the needs of the employees involved, but to insure that a healthy employing entity will remain. Thus, rather than considering back pay, the parties, including the employer, employees, government, and union, may resolve that an employer financed training program is more suited to the needs of the particular employees involved so that upward progression will be facilitated. (See *Wells* v. *Bank of America* (N. D. Cal. 1973 unreported).) Moreover, the employees' union representative, as a partner to any settlement, will be strengthened as a result of its part in securing a voluntary accord. In short, the voluntary agreement reached will meet the needs of the parties involved and therefore will be more durable and willingly obeyed. The likelihood of a

54. It has been estimated that back pay calculations for only 371 class members would require over four years. *Bryan* v. *Pittsburgh Plate Glass Co.*, 5 FEP 616 (W. D. Pa. 1973).

second trial to establish the extent of back pay is slight once liability is determined.

Conversely, a rule affording back pay to successful plaintiffs as of course will entitle the defendant employer to jury trial. A trial by jury will delay the expeditious resolution of Title VII proceedings to the detriment of plaintiffs and the commonweal alike.[55] While some authorities have urged that defendants should be granted jury trials pursuant to the Seventh Amendment of the Constitution when plaintiffs seek back pay in Title VII cases,[56] most courts have deprived employers of a trial by jury. These courts have justified denying a jury trial by relying on the fact that back pay is an integral part of an equitable remedy, a form of restitution, with the decision whether to award this relief committed to the discretion of the trial judge.[57] Inasmuch as there appears to be valid arguments to support preserving jury trial in Title VII cases since the back pay remedy is the equivalent of damages at common law for wrongful discharge,[58] deprivation of trial by jury can be justified—if at all—only so long as the discretion of the trial court is untrammelled by restrictions such as those imposed by the court below.[59] It follows that where a district court's discretion is

55. Delay due to jury trial was recognized by this Court in *Curtis* v. *Loether*, ... U. S. ....., 94 S. Ct. 1005 (1974). In *Curtis* this Court held that the Seventh Amendment of the Constitution entitles a party to a jury trial in actions brought pursuant to Title VIII, the fair housing provisions of the Civil Rights Act, since a trial court had no discretion to deny monetary relief when discrimination was shown.

56. *Ochoa* v. *American Oil Company*, 338 F. Supp. 914 (S. D. Tex., 1972).

57. *Curtis* v. *Loether*, *supra*, at 1010. In *Curtis*, this Court did not express any view on the merits of denying a jury trial in Title VII cases.

58. *St. Clair* v. *Local Union No. 515*, 442 F. 2d 128, 132 (CA 6, 1969).

59. In *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959), this Court observed the right of a jury trial must whenever possible be preserved. See *Developments—Title VII*, *supra*, 1265. It has been

severely circumscribed—as mandated by the decision below—and back pay is to be awarded as of course, a jury trial may well be required by the Seventh Amendment. That is, if the rule of the court below is to be followed, a plaintiff proving unlawful discharge under Title VII will be mechanically entitled to an award of back pay since employers will not now be able to claim that their discriminatory action was based upon state law. Accordingly, in Title VII cases, just as in Title VIII matters, the trial court will have no discretion to deny monetary relief; this Court's rationale that jury trials are required in Title VIII cases will apply equally to proceedings arising under Title VII, and expeditious resolution of these proceedings will be foreclosed.

CONCLUSION.

For the foregoing reasons and those advanced by the Employer, it is respectfully urged that this Court issue a decision consistent with the positions advanced by the Chamber.

Respectfully submitted,

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stated that the presence of an equitable claim for injunctive relief with the back pay claim should not operate to deprive an employer of a jury trial. *Ochoa* v. *American Oil Company, supra,* at 921; see *Curtis* v. *Loether, supra,* at 1009, note 11.

amicus brief

SUPREME COURT, U. S.
FILED
FEB 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners*,

v.

JOSEPH P. MOODY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF SCOTT PAPER COMPANY AS AMICUS CURIAE

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BRIEF OF SCOTT PAPER COMPANY AS AMICUS CURIAE

This brief of Scott Paper Company as *amicus curiae* is filed with the written consents of the parties, which have been filed with the Clerk. Rule 42(2).

THE INTEREST OF SCOTT PAPER COMPANY AS AMICUS CURIAE IN THIS PROCEEDING

Scott's interest in this case stems from the fact that some issues involved here concerning standardized employment tests are also involved, although on markedly

different facts, in a case against Scott, now pending in the Court of Appeals for the Fifth Circuit, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, *Watkins* v. *Scott Paper Co.*, 5th Cir., No. 74-1001.[1]

Scott is a substantial producer of pulp and paper at a number of mills located in various parts of the country. The *Watkins* case challenges various employee promotion practices employed at Scott's first mill in the South, located in Mobile, Alabama. The Mobile mill, built in 1940, was acquired by Scott in 1954. It had been manned in accordance with the traditional Southern practice of limiting blacks to lower paying, more menial jobs.

In late 1961, Scott announced that no job would be barred to any employee or applicant because of race. By 1968, over 300 of Scott's 500 black employees were in jobs historically reserved to whites. Scott's desegregation efforts led the Director of the Industrial Research Unit at the University of Pennsylvania to cite Scott in 1969 "as a leader in minority integration in the [paper] industry" and as having "justly acquired the reputation as *the* place to apply for work in the Negro community." Northrup, THE NEGRO IN THE PAPER INDUSTRY (1969), pp. 110, 111 (emphasis is Professor Northrup's).

In 1958, Scott was planning to open a new Tissue Mill in Mobile. This mill would double the work force and would also introduce machinery that was more ad-

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[1] The facts stated herein are all contained in the record developed at trial, 6 EPD ¶ 8912 (S.D. Ala. August 27, 1973), on file in the Court of Appeals for the Fifth Circuit. Counsel for plaintiffs in *Watkins* include the same New York counsel who represent respondents here.

vanced, faster operating and more highly automated than the printing grade paper machines in use at the old mill. In manning a new Tissue Mill in Everett, Washington, a few years earlier, Scott had found that requiring all job applicants to take the Kopas test (and have a high school diploma or its equivalent) increased the likelihood that new employees could, after extensive and costly on-the-job training, learn to operate the new, complex, fast-moving machinery. Scott's Personnel Director at Mobile in 1958 had been at Everett at the earlier time, and when the new Mobile mill opened in 1958, the Kopas (and high school) requirement was instituted, though initially only for white applicants.

When Scott changed the historic racial practices it had inherited so that blacks were expected to move into all jobs, Scott began requiring blacks to meet the same requirements for hiring and promotion previously required only of whites.

The testing and educational requirements have also been utilized since 1958 to select among applicants for "helper" jobs in the Maintenance Department. Helpers progress almost inevitably to qualification as journeymen in particular crafts in two or more years. Although helpers' wage rates are at the same level as entry level production jobs, Maintenance jobs are much sought after, and the successful applicant usually has accumulated between seven and ten years of seniority in a production department.

Some years after Scott began using the Kopas test, psychologists began to consider the possible racially discriminatory impact of many commonly used employment tests. See, *e.g.*, Educational Testing Service, "An Investigation of Sources of Bias in the Prediction of Job Performance, *A Six Year Study*" (June 22,

1972), at p. 3.[2] As a result, the Office of Federal Contract Compliance (OFCC)[3] questioned the validity of the Kopas test. OFCC recommended that Scott use the Wonderlic test instead. OFCC advised that Wonderlic had been validated at International Paper Company's Mobile mill, right next to Scott's. Scott therefore dropped Kopas in favor of Wonderlic on July 1, 1968.

At the same time, Scott retained Dr. William E. Scott, Jr. (no relation), a qualified industrial psychologist with considerable knowledge of the paper industry. Dr. Scott was not to attempt validation of Wonderlic but to design a new testing program which would validly predict successful job performance at Scott.

Dr. Scott began by spending one week in a Scott mill closely observing worker performance to define the aptitudes required for the job. He then compared these perceived aptitudes and his previously acquired knowledge of the industry with data about available tests. On this basis Dr. Scott selected eight standardized tests and performed concurrent validation studies on these tests at Scott mills in Mobile and Detroit. As to four of the tests, evidence of validity was not strong and they were discarded. Dr. Scott determined that the other four—Bennett Mechanical, Purdue Non-Language, Perceptual Speed, and Closure Flexibility—had a significant relationship to job performance. He recommended that Scott use these tests to screen applicants for hiring in production departments and that it use the first three of the tests to screen applicants for Maintenance jobs.

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[2] This study concluded that the concept of "differential validity" was not supported by the data examined in the study, *id.* at 16.

[3] OFCC is the agency within the Department of Labor which has been given primary responsibility to oversee and enforce compliance with various Executive Orders relating to equal employment opportunity policies of government contractors.

Rather than relying solely upon his concurrent validation study, Dr. Scott recommended that relatively low cutoff scores be used for hiring into production jobs (slightly higher scores were recommended for Maintenance) in order to gather data for a predictive validation study.[4] The Company accepted Dr. Scott's recommendations (although it set the cutoff scores at even lower levels than those recommended by Dr. Scott), and data are now being analyzed for the predictive study.

These decisions were made in the late Summer and early Fall of 1970, and the new test battery was instituted in November of that year. On August 1, 1970, the Equal Employment Opportunity Commission (EEOC), which had prepared guidelines on testing in 1966, published a substantially different and expanded set of guidelines on testing in the Federal Register. 35 Fed. Reg. 12333.

Scott's hiring since the adoption of the new test battery includes approximately 40 percent blacks, whereas the available labor force contains 27.9 percent blacks.

After trial, the District Court in *Watkins* found the evidence insufficient to conclude that Scott's test battery, used as a Maintenance screening device, had a disproportionate racial impact.[5] The Court also found

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[4] A predictive validation study involves giving the test to job applicants but not using the scores as a screening device, and thereafter comparing the scores with job performance of those who have been hired. A concurrent validation study involves giving the test to present employees and then studying the comparison between the test scores and their performance on the job. 29 C.F.R. § 1607.5.

[5] Only seven blacks had taken the test battery for Maintenance, and the Court found this number too small to have statistical significance. *Cf.* Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1338-39 (2d Cir. 1973).

that Scott had carried its burden of establishing that the tests were valid predictors of successful performance in Maintenance jobs.[6]

ARGUMENT

As this summary shows, Scott's *Watkins* case involved a number of points that this Court may consider in deciding this case, although on a different factual record.

First, neither this case nor *Watkins* involves the hasty implementation of a testing program effective contemporaneously with Title VII (as was the case in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)). Scott shares with other employers a strong interest in the sound development of programs which will improve their employee selection procedures. Employers have a strong business purpose in utilizing only those tests which "pass" potentially good workers and "screen out" potentially poor workers. Tests and other sound tools of employee selection substitute objective criteria for subjective or irrational criteria (including race), and thus serve the interests of both employer and minority employee. See EEOC Guidelines, Section 1607.1 (a). Thus, testing is by no means a suspect practice under Title VII. See *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434 & nn. 10 & 11.

Second, both this case and *Watkins* involve the question whether compliance with every detail of the EEOC Guidelines is indispensable to finding that an employ-

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[6] The use of the tests to screen job applicants was not at issue in the trial because the plaintiff class did not include unsuccessful job applicants.

The District Court also found the high school requirement lawful, a finding not challenged by the plaintiffs on appeal.

er's validation study complies with Title VII. Thus, both cases raise issues about the reasonableness of the Guidelines and whether a requirement of strict compliance will, by imposing costly and artificial burdens, drive employers away from using tests, even if professionally developed and validated.[7]

For these reasons, Scott urges that this Court, in passing upon the contentions of the parties in this case, give consideration to the following points.

1. Failure of a Validation Study to Comply with Procedural Requirements of EEOC Guidelines Published After The Study Should Not Cause Rejection of The Study.

The EEOC Guidelines are unquestionably entitled to respect. See *Griggs* v. *Duke Power Co., supra.* On the other hand, the law is what Congress has written, and failure to follow the Guidelines in every particular should not render a validation study unacceptable. *Cf. Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86 (1973).

This must especially be true where the study was conducted before the Guidelines were published and where the discrepancy relates only to procedural, as distinguished from substantative, requirements of the Guidelines.[8] Any other result would automatically invalidate every study conducted before August 1, 1970, (and

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[7] For explorations of this problem, see Wilson, *A Second Look at Griggs* v. *Duke Power Company; Ruminations on Job Testing, Discrimination and the Role of the Federal Courts,* 58 U. VA. L. REV. 844, 873 (1972); Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination; A Reply to Professor Sovern,* 34 U. CHI. L. REV. 817, 831-835 (1967).

[8] See Kinsey v. Legg, Mason & Co., Inc., 8 EPD ¶ 9767, at p. 6207 & n.4 (D.D.C. November 11, 1974).

thus long before *Griggs*) except those which fortuitously complied with procedural rules that were unknown and that could not reasonably be foreseen.[9] For example, the Guidelines (§ 1607.6) require that the *report* of a validation study contain certain elements that professional standards apparently do not require.[10] Certainly, a report to a client which satisfies professional standards, especially if it was made before issuance of the Guidelines, should not be rejected because it lacks non-substantive elements the Guidelines now require.[11]

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[9] It may be presumed that a substantial number of other companies like Scott had already conducted validation studies before the 1970 EEOC Guidelines were published.

[10] We note that the American Psychological Association's recently published *Standards for Educational Tests* (1974) states that *manuals* prepared for test users "should describe the duties of the workers as well as give their job titles." Point E3.1., at 33. The *Standards* label such description as "very desirable" (rather than "essential") but they do not appear to call for any similar requirement of written job analyses for an actual validation study. Requirements for manuals for test users are obviously different from requirements imposed on a testing expert actually conducting a validation study, and the omission of a requirement in the second case is therefore of significance here.

[11] Some requirements in the Guidelines may fall somewhere between the substantive and the procedural. Failure of a validation study (especially if performed before the Guidelines were published) to comply with such "grey area" requirements may pose a more serious problem. If the study is otherwise sound, the better course may be to permit the employer to continue utilizing the test subject to prompt correction of the deficiency. This is the approach followed in the Fifth Circuit when an employer learns that its validation study should have complied with a principle announced for the first time on appeal. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 917-18 (5th Cir. 1973).

2. The Absence of Written Job Analyses Should Not Necessarily Cause Rejection of a Validation Study.

Job analyses apparently serve three purposes in a validation study. Where those purposes are well served by other means, the absence of job analyses is not a substantive deficiency. Moreover, where job analyses *have* been performed but have not been reduced to writing, the study should not be rejected.

The first purpose of job analyses is to assist in the initial selection of tests to be validated. This purpose might be equally served, however, by having the testing expert carefully study the jobs and reach conclusions about the criteria for successful job performance (*e.g.*, observing a fast-moving line of finished products and quickly spotting those which are too large, off-color, etc.), thus obviating the use of job analyses. See C. Lawshe and M. Balma, PRINCIPLES OF PERSONNEL TESTING, at p. 23 (2d ed. 1966). If the expert chooses his tests incorrectly, the result is only a validation study that fails to show correlations between test scores and job performance; if the study does show the appropriate correlation, it is immaterial whether the tests were actually selected on the basis of job analyses. Thus, the absence of written job analyses has no Title VII impact.

The second purpose of job analyses in a concurrent validation study is to provide a basis for objectivity in rating worker performance so that comparisons of performance and test scores may be made. The ratings must distinguish the better performers from the less adequate performers. If the rater does not know how to measure performance levels, the comparisons will not accomplish their purpose. Alternate techniques, however, are commonly employed. One is the paired

comparison technique. Supervisors (who of course already have responsibility for assessing job performance) rate each worker *against each other worker,* and the results are processed by means of statistical techniques to produce ordinal rankings of all the workers.[12] Under such a procedure, the development of formal, written job analyses would not affect the rankings.[13]

The third purpose of job analyses is in comparing two jobs to determine whether they involve similar criteria. For example, there may be too few workers in a particular job to permit a validation study of that job, but if it employs criteria similar to those in a job for which a test has been properly validated, it may be permissible to utilize that test to screen applicants for both jobs.[14] But here again, written job analyses are not the only way to accomplish this comparison. The testing expert, for example, may have made job

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[12] If the worker group contains blacks and whites and a biased supervisor consistently rated blacks below whites, the statistical methods employed for examination of the data would cause this bias to be detected, and hence that supervisor's ratings would not be utilized. C. Lawshe and M. Balma, *op. cit. supra,* pp. 48-49.

[13] A court of appeals has reached a different conclusion. Rogers v. International Paper Co., 9 EPD ¶ 9865 (8th Cir. January 7, 1975).

[14] This issue is present in Scott's *Watkins* case. The validation study conducted by Dr. Scott in 1969 included giving the tests to 119 Maintenance journeymen in six different crafts at Scott's Mobile and Detroit mills. The test could not be validated against certain other craft jobs because there were too few incumbents willing to participate in the validation study. Dr. Scott had studied all of these craft jobs, however, and he concluded that the criteria being measured were applicable to all of the Maintenance craft jobs. Accordingly, he recommended that the same test battery be used to screen applicants for all of the jobs.

analyses but not reduced them to writing; or he may be familiar with the two jobs and able, without preparing written job analyses, to reach a professionally sound conclusion that no significant differences exist between them. In such a case, the absence of written analyses should not bar acceptance of the expert's conclusions.

And, as stated under Argument 1, *supra,* where the formal Guideline requirement of *written* job analyses was issued after the validation study was conducted, absence of written analyses provides even less of a basis for rejecting the study.

CONCLUSION

Scott respectfully urges the Court to consider the arguments made herein in its resolution of the issues in this case which involve validation of standardized employment tests.

Respectfully submitted,

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